United States v. *C. B. & Q. R. Co.*, 90 F. (2d) 161, 168; as well as with that of the Eighth Circuit in *United States* v. *Wheeler Township*, 66 F. (2d) 977, 984-985; and with an earlier decision of the First Circuit itself in *Town of Bedford* v. *United States*, 23 F. (2d) 453, 454-457.

The question here presented has not been, and it is believed should be, directly settled by this Court.

Wherefore, it is respectfully requested that this petition for a writ of certiorari be granted.

WILLIAM CATTRON RIGBY,
Attorney for Petitioner.

MANUEL RODRIGUEZ RAMOS,
Acting Attorney General for Puerto Rico,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court of the United States for Puerto Rico (R. 39-50) is not officially reported. The opinion of the Circuit Court of Appeals (R. 58-60) appears in 134 F. (2d) 267.

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered on March 11, 1943 (R. 68), and rehearing was denied by that Court on April 13, 1943 (R. 68). The time within which to apply for a writ of certiorari to this Court was extended by order of MR. JUSTICE FRANKFURTER to and including July 31, 1943 (R. 69).

Questions Presented

The questions here presented are stated in the Petition (*ante*, pp. 2-5).

Statutes Involved

These are indicated in the petition (*ante*, p. 23), and in the Appendix (*infra*, pp. 55-101).

Statement

A statement of the case is in the Petition (*ante*, pp. 5-8, and 8-14).

Specification of Errors to be Urged

These are indicated in the Petition under the headings "*Questions Presented*" and "*Petitioner's Position: Errors of the Lower Courts*", and in the "*Reasons for Granting the Writ*" (ante, pp. 2-5, 14-23, and 23-24).

Summary of Argument

A summary of the argument is in the Petition under the heading "Petitioners Position: Error of the Lower Courts" (*ante*, pp. 14-23).

ARGUMENT

Point I

This was an integrated irrigation system consisting of upper works for the gathering of the water and for bringing it down to the levels of the irrigated lands with dams, flumes, pipes, canals, pumping stations, electric light and power generating stations, etc., and distribution systems lower down for distributing the water to the various tracts of irrigated land.

A. It had been constructed, in accordance with the statutory requirements, only after the owners of "at least ten thousand (10,000) acres of irrigable lands situated in the municipalities of Isabela, Aguadilla and Moca" had signified their consent to have their lands included in the irriga-

tion districts (Secs. 4, Act No. 63 of 1919; Appendix, *infra*, p. 62), and was laid out and built in contemplation of the further provision of the same Act (Sec. 32, Appendix, *infra*, pp. 69-70) that "Each tract of land shall be made liable only for its proportionate share of taxes determined as herein provided". Accordingly, all of the upper works, the intakes, canals, etc., were built of a size calculated to take care of amounts of water needed to be provided for the entire acreage within the irrigated districts.

B. Likewise the financial arrangements were made on the same basis. Bonds were sold to realize enough money to construct the entire system on that basis, keyed to accommodate the total acreage within the irrigated districts.

Point II

Breaking into the size of the irrigated districts, and subtracting a substantial part of the area of the irrigated lands within one of those districts by taking away some thirteen hundred acres by condemnation proceedings of the federal government [592 acres in this case, and some 703 acres more in the companion case of Pedro Hernandez Almeida (R. 50, 52, 56-"19", supra)], leaves the upper works unsuitably and unnecessarily large and costly for the irrigation of the balance of the lands in the districts, and burdened with liability for the payment of a correspondingly excessive bonded indebtedness for the cost of construction, and correspondingly heavy maintenance charges,—all to be borne by correspondingly increased assessments on the lands left in the districts,—or else by the insular Treasury under the Legislature's guarantee of the bonds and irrevocable pledge of the good faith of The People of Puerto Rico.

The only other way is to bring a corresponding area of new irrigable lands into the district, so as again to utilize the full capacity of the upper works.

Point III

This injury to the system as an integrated whole by thus

destroying pro tanto the functions which the upper works were constructed to fulfill,—and thereby depreciating their value by depriving them to that extent of their functions and, consequently, the system's earning power,—**is to that extent, a "taking" of the system's property, for which "just compensation" should be made; just as much as was the physical taking over and destruction of that part of the distribution system located within the lands condemned.** *United States* v. *Grizzard, supra,* 219 U. S. 180, 183-184 (quoted *ante,* p. 16); *United States* vs. *Miller, supra,* 317 U. S. 369, 376; *United States* v. *Welch, supra,* 217 U. S. 333; *Monongahela Navigation Co.* v. *United States, supra,* 148 U. S. 312, 328-330, 341-345; *United States* vs. *Chicago B. & Q. R. Co., supra,* 82 F. (2d) 131, 134-139, 140 [C.C.A.-8; *certiorari denied,* 298 U. S. 689]; *United States* vs. *Chicago B. & Q. R. Co., supra,* 90 F. (2d) 161-171 [C.C.A.-7; *certiorari denied,* 302 U. S. 714] *United States* vs. *Wheeler Township, supra,* 66 F. (2d) 977, 982-985 [C.C.A.-8]; *Town of Bedford* vs. *United States, supra,* 23 F. (2d), 453, 454-457 [C.C.A.-1]. *Confer, Sharp* vs. *United States,* 191 U. S. 341, 355-357. And see also: *Cooley, Constitutional Limitations,* pp. 565-566; *Lewis, Eminent Domain* (3rd Ed.), Secs. 686, 710.

A. Thus where, in connection with the project to improve the upper Mississippi River by the construction of a series of dams and floodways, the United States Government sought to take in condemnation proceedings a small area of the right-of-way of the Chicago, Burlington and Quincy Railroad, but it also appeared that the consequent raising of the level of the Mississippi River above the dam would so raise the level of the water alongside the Railroad Company's track,—which paralleled the river for some miles in Minnesota at that point,—as to result in so seriously softening and weakening the roadbed that the company found it necessary to raise the tracks, at a very considerable expense,—the Circuit Court of Appeals for the Eighth Circuit affirmed a judgment of the District Court allowing $240,000.00 to the Railroad Company, reimbursing the company for the cost of the relocation of its track, over the objection

of counsel for the Government that the damages should be limited to the value of the land actually taken. The Circuit Court said (*United States v. Chicago, B. & Q. R. Co., supra,* 82 F. (2d) 131, 134-139:

> "Specifically, the question in the court below was whether appellee was entitled to recover as just compensation anything beyond the fair and reasonable value of the 24 acres of land actually and permanently flooded. Recovery, to the above extent, is conceded by appellant. * * *
>
> "[3] It is probable that time was when many of the States of the Union on the matter of condemnation of private property allowed compensation only when property was actually taken and for so much as was actually taken, * * *. But long since, recognizing the utter injustice of so narrow a view, amendments to the organic laws, to statutes, and changes in judicial interpretation well-nigh universally, have so changed the rule as now to give compensation for proximate damages to remaining parts of a parcel of land when some part thereof has been actually taken. In short, such change was wrought, by adding to the word "taken" in the provisions of the Constitution, or to the statute, or by judicial interpretation, the words 'or damaged'."
>
> "In the *Grizzard case, supra*" [*United States* v. *Grizzard,* 219 U. S. 180, 183-184, *ante* p. 16], "as also in the *Welch case, supra*" [*United States* v. *Welch,* 217 U. S. 333], "it was held that the value of an easement of access subservient to the dominant estate, a part of which latter was actually taken, which easement was destroyed by being flooded by a government dam, built in the interest of navigation in a navigable stream, was a proper item of damages for which the United States should pay compensation to the owner of the dominant estate. * * *. In the course of discussion the court said among other things this: 'The "just compensation" thus guaranteed [by the Constitution] obviously requires that the recompense to the owner for the loss caused to him by the taking of a part of the parcel, or single tract of land, shall be measured by the loss resulting to him from the appropriation. * * *.

In recognition of this principle of justice it is required that regard be had to the effect of the appropriation of a part, by taking into account both the benefits which accrue and the *depreciation which results to the remainder in its use and value'*.[11]

"So far as we can find, there has been 'neither change nor shadow of turning,' by the Supreme Court of the United States from the above quoted broad enunciation touching what damages are compensable *in a condemnation suit by the United States*[11] for a flowage easement, over land flooded by a dam constructed in the interests of navigation. * * *. (pp. 135-136)

"[9,10] The questions as to damages for ice, wind, and wave action and silting * * * have already been considered. If, as we doubt, any objection as to the competency of evidence admitted to prove cost of a new entrance into St. Paul, has been * * * properly preserved, * * * then we think the objection is met and disposed of by the case of *United States* v. *River Rouge, etc., Co.* (CCA), 285 Fed. 111, and by what was said by this court in the case of *United States* v. *Wheeler Township, supra,* 66 F. (2d) 977, at page 984. Therein, upon a point which we think is wholly germane in principle, we said this:

> 'Both the Fifth Amendment and Article I, Section 13, of the Constitution of the State of Minnesota require "just compensation". This means that the condemnee must be made whole for what is taken from him. * * * What is here taken from the Township? It is the right to maintain its roads at the natural levels of the lake. It had that right up to the condemnation'.

"In the case at bar, as in the situation involved in the *Wheeler Township case, supra,* the facts and circumstances are unique. There, as here, the actual land involved had little, if any, market value. One was a public highway, and the other is often so denominated. Both are for public use; though one was free, and the other is often used in public carriage for hire. One must be kept up and maintained in a safe condition, because

[11] Italics are those of the Circuit Court of Appeals.

> the statute so required; the other must be operated and maintained in a safe condition, because statutes and incumbent duties as a common carrier so prescribed. And the violation of these duties would spell indirectly the utter destruction of the property of the appellee."

B. And so again in another case involving the same railroad company, and the same general project of improvement of the upper Mississippi River, but with relation to the railroad company's tracks on the East bank of the river in Wisconsin, and so coming up from the District Court for the Western district of Wisconsin, the Circuit Court of Appeals for the Seventh Circuit, affirming the district court's judgment for the railroad company, for $347,811.65,—

> "$400 by way of compensation for appellee's interest in the 1.6 acres" [the land actually taken], "and $347,411.65 for damages proximately caused by the continuous maintenance and operation of the Alma Dam",—

said (*United States* v. *Chicago B. & Q. R. Co., supra,* 90 F. (2d) 161, 167, *et seq.*:

> "[1] It is contended by the Government that it was entitled to appropriate the 1.6 acres, and in so doing it was not liable to appellee in that action for damages accruing by reason thereof to the remainder of appellee's property. We do not understand this to be the law. In *United States* v. *Grizzard* 219 U. S. 180" [*ante,* pp. 16, 28] "the Court said:
>
> > 'Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, injury due to the use to which the part appropriated is to be devoted.'
>
> "That rule has been undeviatingly followed, both by prior and subsequent decisions, * * *. (p. 167)

"The damages awarded by the verdict were caused by the necessity of appellee's raising and protecting its embankment and raising and extending its bridges." * * *. (at p. 169)

"[5,6] The public easement of navigation is limited to the natural levels, widths and flows of navigable streams, * * *. True, the burden of the natural servitude may be increased by the Government, but not without just compensation. * * *. Appellee's properties were constructed in reliance upon the natural level, width and flow of the Mississippi in this area. * * * The river bed is the land upon which the action of the water has been so constant as to destroy vegetation. It does not extend to nor include the soil upon which grasses, shrubs and trees grow. * * * Beyond that point the Government cannot go without compensation for proximate damages." (at page 170)

C. Similarly, in the earlier decision of the Eighth Circuit, in *United States* v. *Wheeler Township,* 66 F. (2d) 977, the judgment of the District Court for the District of Minnesota was sustained allowing Wheeler Township the amount of the damages occasioned to it in relocating its highways at higher levels, and rebuilding them in such a way as to make them "reasonably passable". The roads were those along the shore of the Lake of The Woods which were being partially flooded by the Government's raising of the level of the Lake and of Rainy River under the Treaty of July 17, 1925, between the United States and Canada, and Acts of Congress designed to carry the treaty into effect. The Circuit Court of Appeals said (*United States* v. *Wheeler Township, supra,* 66 F. (2d) 977, 984-985):

"[5,6] The situation here is peculiar. To these exceptional facts we must apply such established general principles as are applicable in order to determine the proper measure of damage—or, more accurately stated, of compensation. Both the Fifth Amendment and Article I, Section 13, of the Constitution of the State of Minnesota, require 'just compensation'. This means that the condemnee must be made whole for what is

taken from him. *United States* v. *Grizzard,* 219 U. S. 180, 184; *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 326, 328; *Winona and St. Peter R. Co.* v. *Denman,* 10 Minn. 267. What is here taken from the township? It is the right to maintain its roads at the natural levels of the lake. It had that right up to this condemnation. * * *. Also, what appellant is here doing is taking, in a legal manner, this right to the extent of the flowage level of the Treaty and of the petition in this action. * * *.

"[7-9] When we come to the method of ascertaining the amount of compensation—the measure of damages or compensation—we encounter the peculiarities of this situation. We have a safe starting point in the above fundamental legal proposition that the township must be made whole from money loss. When the ordinary measure of loss (decrease in actual or assumed 'market value') cannot be applied, as here, then 'whatever is necessary to be considered in order to determine what is an equivalent for the appropriation of private property is germane to the question of compensation". *Winona and St. Peter R. Co.* v. *Denman* 10 Minn. 267 (*supra*), and see *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 328 (*supra*). Here we must be guided by this record as to what money loss will fall upon the township because of this condemnation. It is the duty of the township to maintain its roads and that duty can be enforced (see above citations from Minnesota statutes). The expense therefore comes from the taxpayers of the township, for whom the township is (in a sufficient sense) trustee and representative. The right of the township and its taxpayers is to maintain such roads with the lake at natural levels and 'the right to exoneration from the burden of constructing and maintaining a substitute way is a valuable property right belonging to the group of taxpayers called a town". *Town of Bedford* v. *United States* (C.C.A.-I), 23 F. (2d) 453, 456. To the extent that this burden has been increased by this taking, there is a deprivation for which the law requires compensation. * * *. Why should not this added expense be made good by the one causing it? It cannot be done except in this proceeding."

D. So again the same rule was applied by the Circuit

Court of Appeals for the First Circuit, itself, in the *Town of Bedford* case last above cited by the Eighth Circuit Court, *—Town of Bedford* v. *United States, supra,* 23 F. (2d) 453, 454-457 (ANDERSON, J.), a case quite analogous, in many respects, to the case here at bar.

There the United States, in 1926, took in condemnation proceedings, for a Veterans' Hospital, a tract of about 400 acres of land in the town of Bedford. The taking covered "all rights of every name, nature, and description in and to that portion of Springs Road, so-called" within the tract condemned. The Circuit Court of Appeals says (23 F. (2d), *supra,* at p. 453):

> "Springs Road was an old road, used from time immemorial, and maintained at the expense of the town. The taking cuts out about a half-mile of the road, but the severance will render other portions unavailable and require new roads to connect the *termini.* The facts concerning the extent of the damage need not now be stated; for it is stipulated that, if the town is entitled to recover, the amount shall be $10,000.
>
> "The Court below ruled against the town without opinion. The single question here is whether the taking by the United States, by eminent domain, of a way located in the town, entitles the town to compensation."

Reversing the District Court, and amending the decree of condemnation so as to award the $10,000, with interest, to the Town of Bedford, the Circuit Court said in its opinion (23 F. (2d), *supra,* at pp. 454-455):

> "For present purposes, a town may be regarded as a group of taxpayers, charged, *inter alia,* with the burden of building and maintaining such highways as common convenience and necessity require. Any act that increases those burdens takes additional money from that group of taxpayers. A highway once built exonerates *pro tanto* that group; taken or otherwise destroyed a new burden is imposed. **To take the furnished means of meeting a liability imposed by law has the same effect as taking property technically**

vested; loss accrues. Bedford's right in Springs road was as real a property right as a leasehold of the same land, or as an abutting owner's right of access to the street. *Rigney* v. *City of Chicago,* 102 Ill. 64; *Hart* v. *Buckner* (C.C.A.) 54 Fed. 925, 930; *Old Colony and F. R. R. Co.* vs. *Inhabitants of Plymouth County,* 14 Gray (Mass.) 155.

"* * *. Applying the reasoning of these cases to the problem before us, it is clear that the town of Bedford had a property right in this town way. The road was, as already noted, **a furnished means for the performance of a legal duty.** * * *

"But it is not—and under the stipulation herein cannot—be contended that the town is not injured by the government's taking of this way. The case, therefore, falls plainly under the protection of the Fifth Amendment. The doctrine laid down in *Monongahela Navigation Co.* vs. *United States,* 148 U. S. 312, 325, 326, is fully applicable. In that case, * * *, the Court, by MR. JUSTICE BREWER, held * * * (page 325): 'There can * * * be no doubt that the compensation must be a full and perfect equivalent for the property taken'."

Point IV

It follows, from the foregoing, that the lower courts were in error in denying compensation to the insular government for anything except the cost value [depreciated] of that portion of the distribution part of the system located within the area taken by the federal government in condemnation proceedings.

This decision of the lower courts was in conflict with the foregoing applicable decisions of this Court, and with those of the Circuit Courts of the Seventh and Eighth Circuits, as well as with the principles of the First Circuit's own earlier decision in the *Town of Bedford case* above quoted.

Point V

The interests of the insular government, for its Isabela Irrigation Service, within the lands taken over by the fed-

eral government for the Puerto Rican Air Base, may be viewed in two lights: (1) The insular government's outright ownership of that portion of its irrigation system located within the boundaries of the area thus taken by the federal government,—that part of the distribution end of its system lying within those boundaries,—rights of way, irrigation ditches or canals, delivery gates, weirs, road crossings, flume, electric power lines and transformers, etc., etc., with that part of the Aguadilla Canal especially built to feed water to the lands now taken over; and (2) The insular government's contractual—or *quasi*-contractual—interest in the irrigated lands themselves, under the land owners' acceptances [pursuant to Section 4 of "The Isabela Public Irrigation Law" Act No. 63 of 1919, Appendix, *infra*, p. 62, and kindred sections of that and subsequent Acts] of the mutual contractual obligations to receive and to pay for the water for the irrigation of the lands, and to pay the assessments for the amortization of the bonds and the maintenance and the operation of the irrigation system as a whole.

Point VI

Whether looked at in one or the other of these lights,—or in both,—in whichever light it be viewed,—the allowance to the insular government of simply the [depreciated] cost value of that portion of its own distribution equipment formerly located within the area taken over by the federal government[12], does not compensate the insular government for,—does not "make it whole" against,—either (1) the damage resulting to the balance of the irrigation system through leaving it without any profitable outlet for a substantial portion of the water it was built to collect and carry, or any means of realizing any revenue for that part of its capacity; or (2) the loss of the contractual obligations theretofore resting on the lands to take and receive

[12] And now taken over, and destroyed, by the federal government, as a result of the condemnation proceedings.

the water and pay for it, and to pay the assessments, as above indicated.

Point VII

The District Court, specifically, was in error,—and the Circuit Court of Appeals, likewise, in affirming the District Court,—in holding that this loss is (R. 49) of "a type of consequential damages not compensable".

As was pointed out by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Chicago B. & Q. R. Co., supra,* 82 F. (2d) 131, with regard to an analogous contention there put forward on behalf of the federal government as the appellant in that case (at page 136):

> "In the light of the present well settled law, it is difficult to understand the basis for the broad contention here made; unless it arises from a confusion touching what are so called *consequential damages,* as contra-distinguished from direct or proximate damages. * * *. Ordinarily, '*consequential damages' are those which do not arise as an immediate, natural and probable result of the act done,* but arise from the interposition of an additional cause, without which the act done would have produced no harmful result; while '*proximate damages' are those which accrue directly and in natural sequence,* and as a specific (hurtful) result from the act done, *without the intervention of an independent cause.*"

Within the meaning of that definition, the loss sustained by the insular government's Isabela Irrigation Service here, was, manifestly, in the nature of "proximate damages". It resulted, necessarily and directly, from the act of the federal government in taking over these irrigated lands,—without the intervention of any other independent cause.

Point VIII

Petitioner, The People of Puerto Rico, had a legal right and duty to continue to maintain and operate the entire irrigation system, as a whole, and to continue to levy and collect the special taxes and assessments on the lands within

the irrigation district, for the purposes of repaying the moneys borrowed on the irrigation bonds issued to defray the initial cost of construction of the system, as well as for the purpose of continuing its maintenance and operation.

A. This *legal right and duty* covered the 592 acres[13] now taken by the United States in this condemnation proceeding, equally with the balance of the lands within the irrigation district. This legal right and duty constituted a *"vested right"*; a franchise. "The franchise is a vested right" (*Monongahela Nav. Co.* vs. *United States, supra,* 148 U. S. 312, 341).

B. Under the Organic Act of Congress, the so-called Jones Law, of March 2, 1917, c. 145, 39 Stat. 951, *et seq.*, and its amendments, this petitioner, the insular government, the "People of Puerto Rico", constitutes an organized Territory, an autonomous government enjoying and exercising substantially all, and the same, local governmental rights, powers and duties as do the governments of the sovereign States of the Union. *Puerto Rico* vs. *Shell Co.*, 302 U. S. 253, 258, 261-263.

C. Under Section 3 of the Organic Act (Appendix, *infra,* pp. 55-56) the Congress expressly conferred upon the Legislature of Puerto Rico the powers, *inter alia,*

> "That * * * taxes and assessments on property, * * * may be imposed for the purposes of the insular and municipal governments, respectively, as may be provided and defined by the Legislature of Puerto Rico; and when necessary to anticipate taxes and revenues, bonds and other obligations may be issued by Puerto Rico or any municipal government therein as may be provided by law, and to protect the public credit".

And, by Sections 25 and 37 of the Organic Act (Appendix, *infra,* p 56) the Congress also expressly conferred

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[13] And likewise the 703 acres taken in the companion case. [Foot-note 3, *ante* p. 6; R. 50, 52, 56-"19"].

upon the Legislature *all local legislative powers,* in the broadest terms, providing:

> "Sec. 25. That all local legislative powers in Puerto Rico, except as herein otherwise provided, shall be vested in a Legislature * * * designated 'the Legislature of Puerto Rico'.
>
> "Sec. 37. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate and re-organize the municipalities * * *; also the power to alter, amend, modify or repeal any and all laws and ordinances of every character now in force in Puerto Rico insofar as such alteration, amendments, modification, or repeal, may be consistent with the provisions of this Act."

D. Pursuant to these broad legislative powers thus conferred by the Congress, the Legislature of Puerto Rico, by Acts Nos. 59 and 63 of 1919 and the various amendatory and supplemental acts, created the Isabela Irrigation District and the "Isabela Irrigation Service" and authorized the issuance of the bonds now outstanding to defray the cost of construction and maintenance of the system, and the pledging of the good faith of the People of Puerto Rico to the bondholders for the repayment of the bonds. And also provided for the levying of the special taxes and assessments to meet principal and interest, and to cover the continuing costs of maintenance and operation,—and provided that the annual assesments on the property of any landowner within the district should not exceed $15.00 per acre per annum, and that the assessments should not constitute a personal liability of the land-owner. And by the later Acts of 1936, 1937, and 1941, in view of the difficulties into which the landowners, and consequently the irrigation service, had fallen, during the time of the financial depression, provided for deferring payments of assessments, dividing them into installments, and for commuting those up to June 30, 1936, and extending the time for the payment of the bal-

ance, *first* to 1941, and *then* [by the 1941 Act] *further* up to 1951, and for the levying in the meantime, during those periods of suspension of the full payments, of a fixed special tax of only $1.00 per acre on the lands within the district, *plus* payment for water actually used (Appendix, *infra*, pp. 91-92, 98-101; *ante*, pp. 7-8). *But there has never been any release of any of the lands within the district from their ultimate obligation to pay their fair share of the cost of construction and maintenance of the system*, and for the repayment of the bonds issued for those purposes, subject only to the condition originally provided that no annual assessment shall be in excess of $15.00 per acre, [and to the suspensions above noted, up to 1951].

E. These Acts of the Legislature, and the creation of the irrigation district, the construction of the facilities necessary for carrying out the purposes of irrigating the lands within the district, and the issuance and sale of the bonds carrying the good faith of The People of Puerto Rico, thus created *a legal right and duty* on the part of the People of Puerto Rico, this petitioner, to continue administratively,—without the need of any new legislation [or the right to affect it by any new legislation, in view of the pledge contained in the original Act No. 59 of 1919, Sec. 8; Appendix, *infra*, pp. 59-60],—to levy the special taxes and assessments and to collect them, for the mutual benefit, in their proportionate shares, of all the landowners within the district, and of the bond-holders, for the purposes of paying off the bonds and of maintaining and operating the irrigation service.

Point IX

The insular government, The People of Puerto Rico, has the undoubted power to levy special taxes and assessments on property to be specially benefited thereby. Gallardo vs. Porto Rico Ry. Light & Power Co., 18 F. (2d) 918, 923-925 [C.C.A.-I].

Point X

Since this petitioner, The People of Puerto Rico, possessed the legal right, and duty, to continue to operate the entire system as an integrated whole, and to continue to levy these special taxes and assessments on the lands in the irrigation district,—including the 592 acres now taken away from the district by the United States by these condemnation proceedings,—the District Court was mistaken in holding (R. 49; ante, pp. 8-9) that the injury done to petitioner by breaking into the use of the system, as a whole, and by depriving it of the income from these 592 acres, was damnum absque injuria, or speculative, like the loss of patronage, for example, of a telephone company when lands of its subscribers are condemned.

This loss by the petitioner in the present case is of a wholly different character. It was a loss of the usefulness of a substantial portion of its system, and a deprivation of income to which it was legally entitled, and which it was its legal duty to collect. A loss of a "vested right"; of a "franchise." (*Confer, Monongahela Navigation Co.* vs. *United States, supra,* 148 U. S. 313, 341).

Point XI

The cases relied on by the Circuit Court of Appeals and the District Court are not to the contrary of the foregoing.

A. The Circuit Court of Appeals (R. 67-68; 134 F. (2d) at pp. 272-273), as well as the District Court (R. 49), apparently misunderstood and misapplied the decision of this Court in *Mullen Benevolent Corporation* v. *United States, supra,* 290 U. S. 89 (*ante,* pp. 8-9, 11-12, 22, 23) affirming the decision of the Circuit Court of Appeals for the Ninth Circuit in the same case (63 F. (2d) 48). Both of the lower courts treated that case as authority for holding that, as the District Court phrased it in its opinion (R. 49, *supra*):

"Insofar as loss of future assessments is concerned,

the case is like the loss of bondholders upon condemnation by the United States of lands to which they look for assessments to pay the bonds, which type of loss has been held to be non-compensable. (See *John K. and C. Mullen Benevolent Corp.* v. *United States,* 280 U. S. 89)."

B. Plainly, that is a misunderstanding and misconstruction of this Court's decision in that case.

C. This Court, in that case, held only, as we understand it, as did also the Circuit Court of Appeals for the Ninth Circuit [63 F. (2d), *supra,* 48, 50-56] whose decision was affirmed by this Court,—*that there must be some presently existing interest in the land in the nature of a present property interest,*—in order to constitute a "compensable claim" in condemnation proceedings; and that, accordingly, *where there is no presently existing liability or lien or charge of any kind* in favor of the claimant at the time of the taking of the land in the condemnation proceedings, and *no direct legal obligation or personal liability* at that time on the part of the organization issuing the bonds, the payment of which is to be discharged from the proceeds of the liability or charge or lien on the land, then, in such case, there is no compensable claim.

D. We have no quarrel whatever with that rule. That case fully supports our claim here, where there are:

First, direct ownership of a single entire property, the integrated Isabela Irrigation System, a part of which is actually taken [a part of the distribution equipment], and damage is also inflicted on the functioning of the balance of the system as a whole; and,

Second, as to the lands of the individual landholders in the Irrigation District, lying within the area taken over, there are also both (a) a direct absolute obligation on the bonds, for the payment of which "the good faith of The People of Puerto Rico is irrevocably pledged", and a *"continuous appropriation"* was made in the Acts authorizing their issue, *"and no further appropriation for such purpose shall be required"* (Act No. 59 of 1919 [Sec. 8]; "Joint

Res." of July 3, 1929 [Sec. 9]; Appendix, *infra*, pp. 59-60, 83); and also (b) a *presently* existing *charge or liability* on the lands, at and prior to the time of the beginning of the condemnation proceedings (*ante*, pp. 36-39; and *infra*, pp. 50-52).

E. In the *Mullen Benevolent Corporation* case it appears from the statements of the facts contained in the opinions both of the Circuit Court of Appeals and of this Court, that the irrigation bonds issued by the City of American Falls, Idaho, were expressly made *not* direct obligations of the city, or of its citizens or taxpayers in any way.[14] Pursuant to the statutes of Idaho the legislative authorities of the city (then village) of American Falls passed ordinances providing for the issuance of the bonds and for the levy and collection of special assessments to pay them off and making them a lien upon the lands in the district. The full amount provided by those ordinances was paid, so that they no longer constituted any charge upon the land.

But it appeared that, through some error in the original ordinances, those assessments had not been made big enough completely to amortize the bonds and interest; so that, *after the collection in full of all of those assessments*, there still remained a balance unpaid to the bondholders. As to that balance there was no legal obligation or lien on the part of anybody or any property whatever, because of the express provision in the bonds releasing the city and its taxpayers from any personal liability for their payment and of

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[14] The bonds contained the provision that (*United States* vs. *John K. and Catherine S. Mullen Benevolent Corp.*, *supra*, 63 F. (2d) at p. 49):

> "The holder of any bond issued under the authority of this chapter shall have no claim therefor against the city, town or village by which the same is issued in any event, except for the collection of the special assessment made, for the work of improvement for which said bond was issued, but this remedy, in case of nonpayment, shall be confined to the enforcement of such assessment."

the fact that all of the assessments provided for in the original ordinance had been collected in full, so that no lien or legal charge or contractual liability of any kind remained on any of the land. There was of course, however, a *moral obligation* on the part of the city to see that the bondholders did not lose money through their purchase of the city's bonds, and accordingly, pursuant to statutes of the State of Idaho authorizing such action in case of such a mistake, the city council proceeded, *after the land had been taken over by the condemnation proceedings*, to enact "Ordinances 122, 123, and 124", levying what was called "a reassessment of benefits" upon the lands within the original districts, including that portion of the land that had already been taken over by the federal government in the condemnation proceedings. Of course, plainly,—[and it was apparently so admitted by everyone, all through those proceedings],—that action of the city council levying such "reassessment of benefits" *after the federal government had taken possession,* was simply void in so far as it related to the land then owned by the federal government. The bondholders, however, brought suit under the "Tucker Act" on the apparent theory that the *moral obligation* of the city to pay the unpaid balance on the bonds should be recognized and enforced, since the federal government's proceedings had frustrated the creation of the lien which otherwise would have been created by the city council's "reassessment of benefits".

In the opinions both of the Circuit Court of Appeals and of this Court, the whole case turned upon the question whether or not, under the Idaho statutes, there was, at the time the land was taken over in the condemnation proceedings, any presently existing lien or charge upon it for the payment of plaintiff's claim. It was held that there was no such lien or other liability in existence at that time; since all of the assessments levied under the original ordinance had been paid in full; *and since the new exercise of the legislative authority* of the city,—granted to it by the statutes of Idaho,

to make a reassessment of benefits and to levy new assessmens in the case of error or mistake in the original assessment,—*was not exercised until after the land had passed into the ownership of the United States;* and since, after that event, "no such lien could come into being without the consent of the federal government after it took title."

F. The *Mullen Benevolent Corporation* case is therefore the direct opposite of the present case, in two outstanding respects: (a) There, the bonds carried no direct obligation of the issuing authority, the City of American Falls; whereas, here, the bonds are the direct obligations of The People of Puerto Rico for the payment of which the good faith of The People is irrevocably pledged; and (b) THERE, all of the assessments contemplated by the original ordinance, and for which a lien was given on the lands within the district, had been fully paid and discharged; *and the claim of the bondholders* for their unpaid balance *was based wholly upon new legislative action* taken by the city, purporting to create a new series of assessments on the "reassessment of benefits", *after* the land had already passed into the ownership of the federal government; WHEREAS HERE the liability of the lands for the payment of the special taxes and assessments falling due in the future under the Isabela Irrigation Act rests wholly upon legislative action validly taken by the Legislature of Puerto Rico *before* the condemnation proceedings were begun, so that the liability was actually in existence at the time of the taking.

And continuing provision had been made for the levying (Act No. 63, Sec. 29, as amended by the "Joint Resolution" of July 3, 1929, and the Act of May 15, 1934; Appendix, *infra*, pp. 65-69, 84-90) of the annual assessments each year by the Treasurer of Puerto Rico in a manner definitely determined by the Legislature, so that, as the Circuit Court of Appeals itself says (R. 66; *ante*, p. 10), the annual levy is a "purely ministerial" duty, enforceable by *mandamus* or other proper judicial procedure.

G. Hence, all of the assessments, both those heretofore lev-

ied, as well as the amount of those to be levied by the Treasurer in the future in carrying out such ministerial duty, until the bonds are fully paid, constituted, at the time these condemnation proceedings were begun, a then presently existing continuing charge and liability on the land,—[whether or not then, technically, a "lien; in any event a direct presently existing liability—contractual or *quasi* contractual; a presently existing *property interest* in the lands],—in accordance with the provisions to that effect in Section 29 of the original Irrigation Act No. 63 of 1919, and its amendments of July 3, 1929, and May 15, 1934, *supra* (Appendix, *infra,* pp. 65-69, 84-90).

H. As already noted (Petition, *ante,* pp. 7-8), while the annual levying of these assessments was *suspended* by Section 1 of the Act of May 12, 1936 until June 30, 1941, and again *suspended* by Section 2 of the Act of May 14, 1941 until June 30, 1951, yet there is nothing in either of those suspensions in any way releasing or changing the liability of the lands for the assessments, or the ministerial duty of the Treasurer to levy them again, beginning June 30, 1951, under the original acts of 1919 and their subsequent modifications above noted; and, in the meantime, a like liability ("lien") was created by such Acts of 1936 and 1941 for the *interim* "special taxes" of $1.00 per acre to be levied during the suspension, until June 30, 1951.

I. In view of that then presently existing liability of the lands for these charges, both the assessments and the "special taxes", the claim of this petitioner for the damages caused to it by the loss of the fruits of this liability, through the taking over of 592 acres of the lands upon which it rested [and 703 acres more, in the companion case], is plainly a "compensable claim".

POINT XII

No double compensation is being asked by the People of Puerto Rico.

A. The District Court as above indicated (*ante*, p. 14) was under the mistaken impression that the insular government was asking double compensation for its loss. The District Court said in its opinion (R. 49-50):

> "It is difficult to understand the alleged measure of these damages as expounded by claimant. By the stipulation of the parties it is agreed that claimant has already been paid the fair value of the distribution system located on the lands taken and full compensation for the taking of it. * * *. Claimant would not have been entitled to greater compensation than that; as to said part of its distribution system it has been made whole. The total amount paid was $64,393.07. Undoubtedly, this amount represents the cost of reconstruction new less accrued depreciation as of the date of taking. Yet claimant asserts that the estimated cost of a new distribution system for an equivalent area of land, less accrued depreciation for a like number of years less the total amount of compensation paid, would be $114,716.00. Claimant must contemplate a different kind of distribution system than that located on the lands taken, or it was mistaken as to the fair value of the system located on the lands taken. Or perhaps the cost of the new system contemplated was calculated as of a time other than the date of taking.
>
> "What claimant is asking is that it be paid the fair value of that part of its distribution system located on the land taken and that it be paid also the cost of constructing another distribution system in a different land area. It is not entitled to both."

The Circuit Court of Appeals, quoting the substance of this paragraph of the District Court's opinion, says (R. 62; 134 F. (2d), at p. 270) that it

"effectively disposed of the contention that the People of Puerto Rico is entitled to compensation for the cost of readjusting the irrigation system".

B. The errors of the lower courts in this holding are believed plain:

(1) It ignores the essential basis of the insular government's claim for compensation here; which is, to be made whole against the damage done to it by breaking into the functioning of its coordinated irrigation service, and destroying *pro tanto* its ability to carry on the functions for which the system was constructed and decreasing *pro tanto* its earning power from assessments on the irrigated lands and from sales of water and of electric light and power to enable it to amortize its bonds and to maintain the functioning of the system.

The amount of these damages has nothing to do relatively, or by any comparison of amounts, with the amount of the cost, or of the cost value, of the structures and equipment formerly owned by the insular government within the boundaries of the area of lands which have been taken over by the federal government in these condemnation proceedings.

Those structures and that equipment,—which formerly constituted the portion of the distribution system of the Isabela Irrigation Service located on those lands,—have now likewise been taken over by the federal government, and have been destroyed. They have been paid for by the federal government under the stipulation (R. 29, 33-34) to which reference is made in the above quoted paragraph of the District Court's opinion ["Deficiency Judgment", February 28, 1942 (R. 37-38)].

But the relative amount of that judgment, covering the cost of the tangible property actually taken over and destroyed by the federal government, does not necessarily have anything whatever to do with the amount of the damage done to The People of Puerto Rico by injuring the efficiency of its irrigation system as an integrated

whole,—whether looked at from the standpoint (a) of the injury to its efficiency in carrying out the functions for which it was built, or (b) to the injury to its earning power, or (c) to the cost of relocating a part of it so as to restore its operating efficiency. [See the cases above quoted, particularly *United States* v. *Grizzard, supra,* 219 U. S. 180, 183-184; *United States* vs. *Miller,* 317 U. S. 369, 376, *supra; United States* v. *Welch, supra;* 217 U. S. 333,—; *Monongahela Navigation Co.* v. *United States, supra,* 148 U. S. 312, 328-330, 341-345; and the *Chicago, Burlington and Quincy Railroad cases* (*United States* v. *C. B. and Q. R. Co., supra,* 82 F. (2d) 131, 134-139, 140, and *United States* v. *C. B. and Q. R. Co., supra,* 90 F. (2d), 161, 167-171),—as well as the *Wheeler Township case,* upholding the right of the township to recover the amount of the cost of relocating its highways to accord with the raised levels of the Lake of the Woods, regardless of the original cost of the township roads at the lower levels (*United States* v. *Wheeler Township, supra,* 66 F. (2d) 977, 982-985); and the *Town of Bedford case* where the first Circuit Court itself allowed the Town the $10,000 resulting damage done it by severing a short portion of a highway taken over for a United States Veterans' Hospital, because of the necessarily resulting cost of relocating other portions of the roads and of building new roads to connect *termini* (regardless of the small money value of the part of the road actually taken over) *Town of Bedford* v. *United States, supra,* 23 F. (2d), 453, 454-457.]

(2) It fails to bear in mind that the cost of building a new distribution system today on the same area of land,—592 acres,—would necessarily be very considerably higher than the cost of building the same distribution system twelve years ago in the early days of the financial depression.

The Court will take judicial notice that costs of every kind have risen very materially,— wages and salaries; prices of materials; ocean freights; local transportation costs; everything. The topography of no two tracts of

similar acreage can possibly be the same. The cost of building a distribution system on an adjoining tract, to utilize the full capacity of the upper works to gather and to bring down the amount of water they were constructed to carry,—and so to make whole the loss inflicted on the system as a whole,—is a practical engineering problem.

The District Court should therefore have been willing to hear evidence upon it in support of the insular government's contention; and should not have disposed of it summarily by *a priori* reasoning, as it did in the paragraph of its opinion above quoted (R. 50, *supra*).

Point XIII

Measure of Damages

The amount, or measure, or method of calculating, the damages to the irrigation system may be looked at from several view points, both from the standpoint of who should bear them, and from the standpoint of how the amount should be calculated.

A. *As to who should bear the damages*: Should they be assessed against the United States, or against the interests of the former land owners in the award; or should they be distributed, or allocated, between the United States and the land owners?

B. *The rule in ordinary cases is,* of course, that in condemnation proceedings the federal government (or any other condemnor) is to be adjudged to pay into court the full fair value of all the property taken over; and, having done so, is discharged of money liability to the former owners of the property, and the fund thus realized is to be distributed among the former owners as their respective interests may appear,—the condemnor having no interest in that question. This is the general rule stated by the Circuit Court of Appeals in its opinion (R. 64; 134 F. (2d) at p. 271) and in the authorities there cited.

C. *But there are exceptions to that rule* in those un-

usual cases where the taking results in damage beyond the amount of the value of the physical property actually taken over,—such for example as the *Grizzard case, supra,* and the *Chicago, Burlington and Quincy Railroad cases,* and the *Wheeler Township case,* and the *Town of Bedford case* above quoted (*ante,* pp. 27-34, 48).

D. **As to the measure, or method of calculating, the damages.**—That may be either on the basis of: (a) The cost of building a countervailing distribution system on an equivalent acreage, as was suggested to the District Court; (b) The present worth or value of the liabilities of the acreage taken away; or (c) The proportion of the entire bonded indebtedness which the subtracted acreage bore to the entire irrigated acreage in the District.

The method or measure, and the amount, of the damages should be determined by the District Court, and this case should go back to that Court for that purpose.

Point XIV

The liabilities of the individual landowners of lands located within that portion of the irrigated district taken over by the Federal Government in these proceedings.

A. These lands were subject to a liability,—contractual, or *quasi-contractual,*—for their proportionate shares of the cost of the construction of the entire irrigation system and of its current maintenance and operation at the full capacity for which it was built. That liability was to be discharged in due course by the payments of the assessments and special taxes for the amortization of the bonds and for defraying the current costs of maintenance and operation.

B. That liability [as it stood before the institution of the condemnation proceedings by the federal government] was reflected, in effect, by a subtraction from what would otherwise have been the market value of the lands as they then stood, with their availability for irrigation. The market value, as it then stood, may be regarded as having

been composed of three separate factors, viz.: (1) The market value of the lands in their natural condition, without irrigation; (2) The added value given to the lands by availability for irrigation, without considering irrigation costs—[that is to say, considering the whole irrigation system as completely paid for, in full, and the cost of its current operation and maintenance defrayed by receipts from sales of electric light and power, and of water to parties outside of the irrigated district, so that the irrigation system had become a clear asset to the owners of the irrigated lands within the district]; LESS (3) A subtraction, from the sum of "(1)" "(2)" above, of a factor representing the liabilities of the lands to pay off in due course, by payment of the regular assessments and special taxes as they should fall due, the cost of the construction of the whole system (by amortizing the bonds, principal and interest), and the current costs of maintenance and operation of the whole system (until such time as sales of electric light and power, and of water to parties outside of the irrigated district, might become sufficient to carry all of these costs, and leave the irrigation system as a net clear asset for the owners of the lands within the district).

C. When the federal government's condemnation proceedings broke into the operation of the system and took away a portion of the irrigated lands in the district, it may be regarded as having in effect *matured the liabilities* of the respective lands for their shares of the foregoing charges, so that the lands thus affected should be charged, equitably, with the then *present value or present worth* of their liabilities on those accounts.

D. It results that, in distributing the amount deposited or afterwards paid or found to be payable by the United States in the condemnation proceedings, in determining the amounts of the awards to the respective landholders within the district, *this factor of the liability of the lands for their shares* of the costs of construction and of maintenance and operation of the whole irrigation system

should have been taken into account, as a deduction from the market value of the lands. And that, therefore,

E. The District Court erred in allowing,—as it apparently did, as indicated by the stipulation (R. 55; *ante*, pp. 4-5),—to the landowners *the full value of their lands with the added factor* [what we have called "(2)" above] of their *"availability of irrigation"*, but *without any deduction on account of their liabilities above indicated* [what we have called "(3) above]; and that

F. The District Court should, in distributing the awards, have allowed to the insular government the amount of that factor,—"(3)" above,—of the present worth or present value of those liabilities of the lands taken over within the district, as one element of its "just compensation" for the injuries done to the irrigation system as a whole, and in order to aid it, as above indicated, in the amortization of the outstanding bonds, or else toward the expense of extending its distribution service to other available lands so as once more to utilize the normal capacity of the upper works of the whole system.

G. What the amounts of such allowances should be,—and how much, relatively, of the entire amount of the compensation to the insular government for the general injuries caused it,—should be charged against the individual landowners on account of these liabilities,—and how much should be charged directly to the condemnor, the United States Government as damages over and above the market value of the lands and of the local distribution equipment actually taken over [15], is a matter of accounting, for which this case should go back to the District Court.

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[15] As was done, for example, in the two *Chicago, Burlington and Quincy Railroad Company* cases, and in the *Wheeler Township* and the *Town of Bedford* cases, and as this Court held proper, in the *Grizzard* case, as well as in the *Monongahela Navigation Company* case [*ante*, pp. 27-34].

CONCLUSION

For all the foregoing reasons, the District Court erred in denying compensation to the insular government for the general damages to its Isabela Irrigation System as an integrated whole, in addition to the depreciated actual cost value of that portion of its distribution equipment located in the area of the lands actually taken over by the federal government; and erred also in not going ahead in the same proceeding to evaluate and to award to the insular government, as part of its compensation for the general injuries to the irrigation system as a whole, the present worth or present value of the liabilities of the lands taken over for their respective shares of the costs of the construction of the whole system and of its current maintenance and upkeep, for which the insular government, as well as the other landholders within the entire irrigation district are irrevocably liable to the bondholders; and the Circuit Court of Appeals erred in affirming the judgment of the District Court.

Accordingly the writ of certiorari should issue, for the reasons stated in the Petition (*ante*, pp. 23-24), and the judgments of the Circuit Court of Appeals and of the District Court should be reversed, and this case remanded to the District Court for further proceedings.

Respectfully submitted,

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